

**ROBERTSON, Senior Judge**

## STATEMENT OF THE CASE

Appellant-Defendant Dion T. Wright appeals the trial court's revocation of his probation. We affirm.

## ISSUES

Wright raises two issues, which we restate as:

- I. Whether the trial court erred by admitting into evidence during the probation revocation proceeding an affidavit regarding Wright's failure of a drug test; and
- II. Whether the trial court abused its discretion by ordering Wright to serve thirty months of his previously suspended sentence.

## FACTS AND PROCEDURAL HISTORY

In August 1999, the State charged Wright with possession of cocaine, a Class D felony, and resisting law enforcement, a Class A misdemeanor. In May 2000, Wright entered into a written plea agreement, wherein he agreed to plead guilty as charged to the two charges in this case as well as to a Class D felony possession of cocaine charge in cause number 48D01-9907-DF-175 ("cause 175") and to a Class C felony fraud on a financial institution charge in cause number 48D01-9906-CF-165 ("cause 165"). The plea agreement left sentencing open to the trial court but placed a cap of four years on any executed time.

In June 2000, the trial court sentenced Wright to a three-year suspended sentence for his possession of cocaine conviction to be served concurrently to a one-year suspended sentence for his resisting law enforcement conviction. The trial court placed Wright on probation and ordered Wright's three-year suspended sentence to run

consecutively to the sentences in cause 165 and cause 175.<sup>1</sup> As part of Wright's probation, he was required to complete a work release program, to abstain from alcohol and drug use, and to submit to random drug testing.

In July 2001, the State filed a notice of probation violation, in which it alleged that Wright had driven while his license was suspended and had failed to complete the work release program. Following Wright's admission to the alleged violations, the trial court ordered Wright to serve approximately forty-five days in the Madison County Community Corrections Complex.

In November 2001, the State filed a second notice of probation violation, alleging that Wright had provided false information to a police officer, consumed alcohol, and violated curfew. This notice of probation violation was filed under this case and under cause 165. Following a hearing, the trial court found that Wright had violated probation by failing to abstain from alcohol and violating curfew. The trial court revoked Wright's probation under cause 165 and did not impose a sanction under this case. The trial court ordered that Wright would be returned to probation under this case following the completion of the executed sentence under cause 165.

In January 2004, the State filed a third notice of probation violation, which it later amended in June 2004, and alleged that Wright had failed to report to probation and had tested positive for cannabinoids (marijuana) and cocaine. The trial court held an

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<sup>1</sup> Under cause 165, the trial court sentenced Wright to eight years, with three years executed and five years suspended to probation. The record does not reveal the sentence imposed in cause 175 except that it was to be served concurrently to the sentence in cause 165.

evidentiary hearing on June 28, 2004, but Wright failed to appear. The trial court issued a warrant for Wright's arrest and deferred the hearing until such time.

Almost three years later, in January 2007, Wright was arrested on the warrant. In February 2007, the State amended the third notice of probation violation and added the following allegations of violations: (1) Wright had committed the criminal offense of resisting law enforcement in Marion County in October 2006 and had been convicted of such crime in January 2007; and (2) Wright failed to pay probation fees.

That same month, the trial court held an evidentiary hearing, and Wright admitted that he had been arrested for and convicted of resisting law enforcement. During the hearing, the probation officer testified that in June 2004 Wright had submitted a urine sample that tested positive for drug use. The State then introduced into evidence the urinalysis test results and an affidavit from Jeff Retz, the scientific director at Witham Memorial Hospital Toxicology Laboratory, regarding the testing procedures used and Wright's positive marijuana and cocaine test results. Wright objected, arguing that the exhibit was violative of Wright's right to cross-examine Retz. The trial court admitted the exhibit over Wright's objection.

The trial court determined that Wright had violated probation by: (1) failing to timely report to probation; (2) failing to abstain from drugs; and (3) violating the laws of the State by committing a new criminal offense. The trial court revoked Wright's probation and ordered him to serve thirty months of his previously thirty-six month suspended sentence and to thereafter be discharged from probation. Wright now appeals.

## DISCUSSION AND DECISION

### I.

Because Wright admitted that he violated probation by committing the crime of resisting law enforcement, he does not challenge the trial court's decision to revoke his probation. Nevertheless, Wright challenges that trial court's finding that he violated probation by using drugs and argues that the trial court erred by admitting Retz's affidavit into evidence during the probation revocation hearing.<sup>2</sup> Wright contends that the admission of the affidavit violated his due process rights and his right to confrontation and cross-examination.<sup>3</sup>

There is no right to probation, and a trial court has "discretion whether to grant it, under what conditions, and whether to revoke it if conditions are violated." *Reyes v. State*, 868 N.E.2d 438, 440 (Ind. 2007), *reh'g denied*. "The due process right applicable in probation revocation hearings allows for procedures that are more flexible than in a criminal prosecution." *Id.* Accordingly, "courts may admit evidence during probation revocation hearings that would not be permitted in a full-blown criminal trial." *Id.*; *see also* Ind. Evidence Rule 101(c)(2) (explaining that the Indiana Rules of Evidence are not

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<sup>2</sup> Wright contends that the trial court's finding that he violated probation by using drugs affected the trial court's decision to order him to serve thirty months of his suspended sentence.

<sup>3</sup> Wright specifically contends that the admission of Retz's affidavit violated his right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004). Our appellate courts have already held that the holding in *Crawford* is not implicated in probation revocation hearings. *See Reyes v. State*, 868 N.E.2d 438, 440 n.1 (Ind. 2007), *reh'g denied*; *Marsh v. State*, 818 N.E.2d 143, 147 (Ind. Ct. App. 2004). Thus, we need not address this argument.

applicable in probation proceedings). For example, “the [United States] Supreme Court specifically listed affidavits as a type of material that would be appropriate in a revocation hearing even if not in a criminal trial.” *Id.* at 440-41 (referencing *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) and *Morrissey v. Brewer*, 408 U.S. 471 (1972)).

Nevertheless, “[t]his does not mean that hearsay evidence may be admitted willy-nilly in a probation revocation hearing.” *Id.* at 440. In *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999), *reh’g denied*, the Indiana Supreme Court held that “judges may consider any relevant evidence bearing some substantial indicia of reliability[,]” including reliable hearsay. More recently, in *Reyes*, our Supreme Court adopted the substantial trustworthiness test as the approach to be used to determine the reliability of hearsay evidence in probation revocation proceedings. *Reyes*, 868 N.E.2d at 441. In the substantial trustworthiness test, “the trial court determines whether the evidence reaches a certain level of reliability, or if it has a substantial guarantee of trustworthiness.” *Id.* “[T]he substantial trustworthiness test implicitly incorporates good cause into its calculus.” *Id.* When a trial court applies this substantial trustworthiness test, “*ideally* [the trial court should explain] on the record why the hearsay [is] reliable and why that reliability [is] substantial enough to supply good cause for not producing . . . live witnesses.” *Id.* at 442 (emphasis added; quoting *United States v. Kelley*, 446 F.3d 688, 693 (7th Cir. 2006)).

Here, the trial court admitted Retz’s affidavit over Wright’s objection, but it did not make explicit findings as to the reliability of this hearsay evidence.<sup>4</sup> While the preference is for the trial court to make a determination of substantial trustworthiness on the record, this failure to do so is not fatal where the record supports such a determination. *See Reyes*, 868 N.E.2d at 442 (affirming the trial court’s admission of affidavits in a probation revocation hearing despite the fact that the trial court did not provide a detailed explanation on the record because the evidence adequately supported a finding that the affidavits were substantially trustworthy); *see also Kelley*, 446 F.3d at 693 (holding that the record was sufficiently clear for the appellate court to conclude the hearsay was sufficiently trustworthy); *United States v. Pratt*, 52 F.3d 671, 675 (7th Cir. 1995) (affirming a revocation based on hearsay evidence because the district court could have found hearsay evidence reliable and the government could have shown good cause for not producing the witnesses), *cert. denied*, 516 U.S. 881 (1995).

The record before us indicates that there was sufficient information to deem Retz’s affidavit substantially trustworthy. Retz’s curriculum vita was introduced and Retz’s affidavit reveals that Retz has a Bachelor of Science degree in Chemistry and has been the Scientific Director of Witham Lab for over eight years. Prior to his employment at Witham Lab, Retz was a laboratory supervisor for the Indiana State Department of Toxicology for fifteen years. Retz indicated that in his capacity as the Scientific Director of the lab, he was “familiar with the procedures employed to ensure the chain of custody

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<sup>4</sup> We note that Wright’s probation revocation hearing was held prior to the date our Supreme Court issued its *Reyes* opinion.

of samples, the testing of those samples and the validity of the test procedures employed by” Witham Lab. State’s Exhibit 1 at 1. Retz reviewed “all of the records in this laboratory in regard to the urine sample received which was labeled as a sample taken from: Dion Wright, taken on 6/10/2004[.]” *Id.* at 2. In his sworn affidavit, Retz concluded that Wright had used marijuana within the sixty days prior to the collection of Wright’s urine sample and had used cocaine within forty-eight hours of the urine sample collection. This evidence supports a finding that Retz’s affidavit is substantially trustworthy.<sup>5</sup> *See, e.g.*, *Reyes*, 868 N.E.2d at 442-43. Therefore, we conclude the trial court did not err by admitting Retz’s affidavit into evidence during the probation revocation hearing but note that the “trial court should have applied a test of ‘substantial trustworthiness’ in doing so.” *Id.* at 443.

## II.

Wright also argues that the trial court abused its discretion by ordering him to serve thirty months of his suspended sentence. We review a trial court’s sentencing decision in probation revocation proceedings for an abuse of discretion.<sup>6</sup> *Sanders v. State*, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), *trans. denied*. An abuse of discretion occurs if the trial court’s decision is against the logic and effect of the facts and

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<sup>5</sup> Indeed, the affidavit that our Supreme Court held was substantially trustworthy in *Reyes* was sworn by the same Jeff Retz whose affidavit is challenged in this case and appears to be substantially similar to Retz’s affidavit in this case.

<sup>6</sup> Wright suggests that we should review the appropriateness of his thirty-month sentence under Indiana Appellate Rule 7(B), which provides that we may revise a sentence if we find that it is inappropriate in light of the nature of the offense and the character of the offender. We have previously rejected a defendant’s argument to engage in such a review, *see Jones v. State*, 873 N.E.2d 725, 727-28 (Ind. Ct. App. 2007), and we continue to do so in this case.



circumstances before the court. *Abernathy v. State*, 852 N.E.2d 1016, 1020 (Ind. Ct. App. 2006).

“Probation is a criminal sanction wherein a convicted defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment.” *Brabandt v. State*, 797 N.E.2d 855, 860 (Ind. Ct. App. 2003). A defendant is not entitled to serve a sentence in a probation program; rather, such placement is a “matter of grace” and a “conditional liberty that is a favor, not a right.” *Id.* (quoting *Cox*, 706 N.E.2d at 549).

Pursuant to Indiana Code § 35-38-2-3(g), after finding that a person has violated a condition of his probation, the trial court may:

- (1) continue the person on probation, with or without modifying or enlarging the conditions;
- (2) extend the person’s probationary period for not more than one (1) year beyond the original probationary period; or
- (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing.

Ind. Code § 35-38-2-3(g). “[U]ltimately it is the trial court’s discretion as to what sanction to impose under th[is] statute.” *Abernathy*, 852 N.E.2d at 1022.

Wright does not allege that the trial court improperly found him to be in violation of the terms of his probation. He also does not dispute that the trial court had statutory authority to order execution of part of his previously suspended sentence. Instead, Wright contends that the trial court’s imposition of any executed time was an abuse of discretion given his positive military background, family support, and productive employment status.

This is not the first time Wright has violated his probation. He was found to have twice violated his probation in 2001, and he had his probation revoked in cause 165. Even after serving his executed time in cause 165, Wright was apparently not deterred from a life of crime; indeed, he admits to violating his probation by committing an additional offense of resisting law enforcement, and he consumed marijuana and cocaine. Moreover, Wright failed to appear for a probation revocation hearing and had an outstanding warrant for his arrest for almost three years. The trial court acknowledged Wright's commendable military service and family support but determined that the facts before the court required the imposition of an executed sentence:

[W]hat's a guy like you with gifts and, and military ability and good family support and all that, what's a guy like you doing here in a[n] orange suit hiding out from probation for four (4) years with a warrant outstanding, using drugs and getting convicted for resisting? . . . I'm not going to sweep them [your probation violations] under the rug just because you're a capable guy who is able to do a lot more and who has demonstrated, by his past behavior, that he has done a lot more.

Transcript at 51. We conclude the trial court acted well within its discretion when it ordered Wright to serve thirty months of his previously suspended thirty-six month sentence.

Affirmed.

KIRSCH, J., and MAY, J., concur.